Perkins Coie

700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
PHONE: 202.654.6200
FAX: 202.654.6211
www.perkinscoie.com

Marc Erik Elias
PHONE (202) 434-1609
FAX (202) 654-9126
EMAIL MElias@perkinscoie.com

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State Elections Enforcement Commission
Attn: Legal Unit – Compliance
20 Trinity Street – Fifth Floor
Hartford, CT 06106

Re: Comments on Proposed Declaratory Ruling 2013-2

To Whom It May Concern:

We write to comment on Proposed Declaratory Ruling 2013-2, which was issued in response to our request dated October 9, 2013 and our supplemental request dated November 1, 2013.

We agree with the Proposed Declaratory Ruling in two significant respects. *First*, the Proposed Declaratory Request correctly finds that Organization #1, a section 527 organization that does not accept donations earmarked for use in Connecticut elections, is not a "political committee." Accordingly, if Organization #1 makes independent expenditures, it could satisfy its reporting obligations by complying with section 8 of Public Act 13-180. *Second*, the Proposed Declaratory Request properly determines that the State Elections Enforcement Commission (the "Commission") may not enforce contribution limits with respect to political committees that receive and spend funds for independent expenditures only ("IE-only political committees").

The Proposed Declaratory Ruling also concludes that Organizations #2 and #3 are "political committees."[1] To avoid an unconstitutional result, the Proposed Declaratory Ruling should be clarified in two ways. *First*, the Proposed Declaratory Ruling should explain that persons (other than individuals) that are not raising earmarked money for Connecticut electoral activity are not required to establish a political committee to contribute to IE-only political committees and may instead donate to such committees from their general treasury funds. *Second*, the Proposed

[1] Our request described Organization #2 as a national organization that accepts some earmarked donations for use in Connecticut elections and Organization #3 as an organization formed for the express purpose of participating in Connecticut elections. The Proposed Declaratory Ruling reverses that arrangement, describing Organization #2 as the organization formed for the express purpose of participating in Connecticut elections and Organization #3 as the national organization that accepts some earmarked donations for use in Connecticut elections.

Declaratory Ruling should make clear that the so-called "one person, one PAC" rule does not bar a section 527 organization from maintaining a traditional political committee to contribute to candidates and political party committees *and* supporting the efforts of a separate IE-only political committee, as long the organization either has no interaction with candidates or political party committees that would prevent communications from being independent expenditures pursuant to section 9-601c or establishes and maintains a firewall pursuant to section 9-601c(d).[2]

I. The Proposed Declaratory Ruling is Correct on Two Significant Issues

The Proposed Declaratory Ruling correctly finds that Organization #1, a section 527 organization that does not accept donations earmarked for use in Connecticut elections, is not a "political committee." As the Proposed Declaratory Ruling notes, "[t]he plain language [of Public Act 13-180] instructs that the law was changed to provide that there is no need to form a committee if the only expenditures a group will make are wholly independent of Connecticut candidates, party, or political committees." Prop. Dec. Ruling at 13. Thus, "Organization 1 falls squarely within section 8 and *Citizens United*'s direction that an entity may make unlimited independent expenditures from its treasury." *Id.* We agree.

The Proposed Declaratory Ruling's announcement that the Commission will not "enforce contribution limits to political committees that receive and spend funds for independent expenditures only" and will instead "establish a way for political committees that will act wholly independent of Connecticut candidates and parties to register as 'independent expenditure only' political committees" is also correct. *Id.* at 22. This result is dictated by the recent Second Circuit decision in *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483 (2d Cir. 2013). Since we filed our initial request, two additional circuit courts have joined the broad consensus, holding that states may not enforce source restrictions and contribution limits, respectively, as applied to IE-only political committees. *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535 (5th Cir. 2013); *Republican Party of New Mexico v. King*, No. 12-2015, 2013 WL 6645428 (10th Cir. Dec. 18, 2013). As the Second Circuit noted, "[f]ew contested legal questions are answered so consistently by so many courts and judges." *Walsh*, 733 F.3d at 488. Accordingly, the Commission may not enforce contribution limits with respect to IE-only political committees.

II. Two Clarifications are Necessary to Avoid an Unconstitutional Result

A. Persons Other Than Individuals Need Not Establish Political Committees to Donate to IE-Only Political Committees

[2] Had the Commission determined that Organizations #2 and #3 were not "political committees," this question would be moot; however, the conclusion reached in the Proposed Declaratory Ruling makes it necessary to reach this question.

The Proposed Declaratory Ruling should make clear that persons other than individuals are not required to establish political committees of their own in order to contribute to IE-only political committees and may instead donate to such committees from their general funds.

Section 9-602(a) of the General Statutes provides that "[e]xcept with respect to an individual acting alone ... no contributions [in excess of $1,000] may be made, solicited or received and no expenditures, other than independent expenditures, may be made, directly or indirectly, in aid of or in opposition to the candidacy for nomination or election of any individual or any party or referendum question" unless the person registers as a political committee. Conn. Gen. Stat. § 9-602(a). If that requirement were enforced against persons that contribute to IE-only political committees – but do not accept contributions earmarked for use in Connecticut elections – it would mean that corporations, labor unions, and section 527 organizations could not contribute to IE-only political committees from their general treasury funds. Instead, such persons would be required to establish political committees, solicit contributions in $1,000 increments from individuals, and use these "hard money" funds to contribute to IE-only political committees.

That result is clearly unconstitutional under *Citizens United*, *Walsh*, and their progeny. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court of the United States held that the government may not prohibit particular classes of speakers from sponsoring independent expenditures, because such expenditures did not present the threat of corruption or its appearance. Two months later, the U.S. Court of Appeals for the D.C. Circuit concluded that, in light of *Citizens United*, "the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations." *Speechnow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc). As a result, "the limits on contributions to [such organizations] cannot stand." *Id.* The Second, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits have reached the same conclusion: the government may not limit contributions to an IE-only political committee. *See Walsh*, 733 F.3d 483; *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008); *Texans for Free Enter.*, 732 F.3d 535; *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 153 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118 (9th Cir. 2011); *Republican Party of New Mexico v. King*, No. 12-2015, 2013 WL 6645428 (10th Cir. Dec. 18, 2013).

Several federal circuits have considered whether the government may limit persons other than individuals from contributing their general treasury funds to IE-only political committees. Every federal circuit has answered in the negative. Recently, the Fifth Circuit affirmed the issuance of an injunction barring Texas from enforcing a law that prohibited coprorations from contributing to IE-only political committees with general treasury funds:

> We tread a well-worn path. ...[E]very federal court that has considered the implications of *Citizens United* on independent groups ... has been in

> agreement: There is no difference ... between banning an organization ... from engaging in advocacy and banning it from seeking funds to engage in that advocacy (or in giving funds to other organizations to allow them to engage in advocacy on its behalf).

Texans for Free Enter., 732 F.3d at 537-38. That follows decisions by federal district courts in Montana and Michigan striking down statutes that prohibited coprorations from contrributing to IE-only political committees with general treasury funds. *Lair v. Murry*, 871 F. Supp. 2d 1058, 1068 (D. Mont. 2012) ("[S]ince, under *Citizens United*, governments cannot restrict independent expenditures made by organizations, governments cannot ban corporate contributions to political committees that the committees then use for independent expenditures. Those contributions 'can only lead to independent expenditures,' which, under *Citizens United*, governments cannot restrict."); *Michigan Chamber of Commerce v. Land*, 725 F. Supp. 2d 665, 693 (W.D. Mich. 2010) (holding that if an entity has a constitutional right to make independent expenditures, the state "does not somehow magically acquire authority to restrict those expenditures merely because the spender joins together with other entities which also have the right to make or fund such expenditures – especially after *Citizens United*.").

Forcing a person to establish a political committee in order to donate to an IE-only political committee is not a constitutionally acceptable substitute. In *Citizens United*, the Supreme Court considered, and rejected, the government's argument that a ban on disbursements from the entity's treasury could be ameliorated by allowing that same entity to donate through a political committee. *Citizens United*, 558 U.S. at 337-39. The Supreme Court recognized that donating through a political committee was materially different than donating from one's treasury funds. *Id.* at 337 ("A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak."). *See also Minnesota Citizens Concerned for Life v. Swanson*, 692 F.3d 864 (8th Cir. 2012); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013). That would be particularly true where, as here, the donor political committee would be subject to limits and restrictions on incoming contributions. Such a requirement would effectively reinstate the contribution limits that federal courts have struck down as unconstitutional.

B. <u>The "One Person, One PAC" Rule Does Not Bar a Section 527 Organization from Maintaining a Traditional Political Committee and Supporting the Efforts of a Separate IE-Only Political Committee</u>

The "one person, one PAC" rule does not preclude a section 527 organization from both maintaining a traditional political committee to contribute to candidates and political party committees *and* supporting the efforts of a separate IE-only political committee, as long as a

firewall is established and maintained pursuant to section 9-601c(d).[3] The Proposed Declaratory Ruling ought to make that explicit.

If the Proposed Declaratory Ruling goes into effect, section 527 organizations wishing to participate in the 2014 elections would either: (a) have no interaction with candidates or political party committees that would prevent communications from being independent expenditures pursuant to section 9-601c; or (b) establish an internal firewall that comports with § 9-601c(d). Individuals on the "independent side" of the firewall would identify a Connecticut resident to serve as treasurer and establish an IE-only political committee. The section 527 organizations would provide funding to the IE-only political committee and would also maintain a traditional political committee – staffed by personnel on the "coordinated side" of the firewall – to contribute to candidates and political party committees. The treasurers for each committee would be different and the bank accounts for each committee would be segregated from each other.

Such an arrangement complies with the plain language of sections 9-605(e)(1), 9-613(a), and 9-614(a) of the Connecticut statutes. The first of these restrictions provides that "[n]o *individual* shall establish or control more than one political committee." Conn. Gen. Stat. § 9-605(e)(1) (emphasis added). Under the proposed arrangement, the individuals who establish and administer the traditional political committee would be different than the individuals who play a role in establishing and administering the IE-only political committee. Accordingly, the arrangement comports with the plain language of section 9-605(e)(1). Meanwhile, sections 9-613(a) and 9-614(a) are inapposite here, because they apply to "business entities" and "organizations," respectively, not section 527 organizations. *Id.* § 9-601(7), (8).

There are policy reasons not to apply the "one person, one PAC" rule to these facts. The rule is a prophylactic measure to protect contribution limits to candidates and political party committees. In the absence of such a rule, individuals, business entities, and organizations could establish more than one political committees and effectively double (or more) the amounts that they raised and gave to candidates and party committees. But the rule serves no purpose where, as here, the recipient political committee (an IE-only committee) is not subject to contribution limits and, more importantly, is legally barred from contributing to candidates or party committees.

Finally, the government may not condition an organization's right to donate to IE-only political committees on its willingness to refrain from contributing to candidates or party committees.

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[3] The firewall would be designed and implemented to prohibit the flow of information between (1) individuals (including employees and consultants of the section 527 organizations) working with the IE-only political committee in the creation, production, and dissemination of its independent expenditures and (2) candidates, party committees, their agents, and other persons (including employees and consultants of the section 527 organizations) working with them. However, we do not ask the Commission to opine on whether such an arrangement comports with § 9-601c(d); that is beyond the scope of this ruling.

Nor may it condition an organization's right to donate to candidates or party committees on its willingness to refrain from donating to IE-only political committees. Prior to *Citizens United*, the D.C. Circuit held that "[a] non-profit that makes [independent] expenditures to support federal candidates does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to parties or candidates." *EMILY's List v. Fed. Election Comm'n*, 581 F.3d 1, 12 (D.C. Cir. 2009). Following *Citizens United*, the Federal Election Commission ("FEC") acknowledged that a nonprofit corporation that maintained a PAC to contribute to candidates and political party committees could establish a separate political committee to make independent expenditures. *See* FEC Adv. Op. 2010-9 (Club for Growth). When the FEC subsequently sought to require nonprofits to establish legally separate political committees to engage in coordinated and independent activities, a federal district court held that it violated the First Amendment. *Carey v. Federal Election Comm'n*, 791 F. Supp.2d 121, 128-33 (D.D.C. 2011). In fact, the court awarded attorneys' fees to the plaintiffs because the FEC's initial position was not "substantially justified" in light of *EMILY's List*. *Carey v. Federal Election Comm'n*, 864 F. Supp.2d 57, 63 (D.D.C. 2012).

In summary, the "one person, one PAC" rule does not bar a section 527 organization from both maintaining a political committee to contribute to candidates and political party committees *and* supporting the efforts of a separate IE-only political committee.

Thank you for your consideration and please do not hesitate to get in touch should you have additional questions.

Very truly yours,

Marc E. Elias